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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 635

MOORE-McCORMACK LINES, INC.,
Petitioner,

AGAINST

EDWARD FOSTER,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

JACOB RASSNER,
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INDEX.

	PAGE
Statement	1
The Questions Involved	2
The Facts	4
POINT I.—No principle is involved, or issue presented which this court should review or pass upon	5
POINT II.—A disputed question of fact decided by a jury is not a subject for review by the United States Supreme Court	6
CONCLUSION	7

CASES CITED.

Brady v. Roosevelt Steamship Company, Inc., Number 269 of the October, 1942 Term, decided, January 18, 1943	2, 5, 6
Campana Corp. v. Harrison, 114 F. (2d) 400	6
Cohen v. Evening Star Newspaper Co., 113 F. (2) 523	7
Hyde v. U. S., 225 U. S. 347	6
Krug v. Mutual Benefit & Acc. Ass'n., 120 F. (2d) 296	7
Lynch v. Oregon Lumber Co., 108 F. (2) 283	7
Mattox v. U. S., 146 U. S. 140	6
McDonald v. Pless, 238 U. S. 264	6
McVeigh, 117 F. (2) 672	7

AUTHORITIES CITED.

PAGE

46, U. S. C. A., Section 688 (The Jones Act) 2

Suits in Admiralty Act, 46, U. S. C. A., 741, 742 .. 2

8 Wigmore, Evidence (3rd Ed. 1940) 668-677, 282 ff. 6

Sunderland, Verdicts General and Special 29 Yale L. J. 253 (1919) 6

Title 28, U. S. C. A., Section 723 C, Rule 51 7

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Statement.

The complaint sets forth a claim for damages for personal injuries and maintenance and cure by a seaman against his employer, a private steamship operator, predicated upon an accident which resulted through the ship operator's failure to provide a reasonably safe place wherein to work.

The case was tried before Honorable Alfred C. Coxe and a jury on the 19th, 20th and 21st days of May, 1942, in the United States District Court for the Southern District of New York, which jury returned a verdict in

favor of the plaintiff in the sum of Nine Thousand ($9,000.00) Dollars, which included maintenance and cure.

The Trial Court refused to interfere with the verdict.

The reasonableness of the amount is not questioned.

The Circuit Court of Appeals for the Second Circuit, having been composed of Judges Learned W. Hand, Harrie Brigham Chase and Jerome N. Frank, unanimously affirmed the judgment.

The opinion of the Circuit Court of Appeals for the Second Circuit is printed on pages 282, 283 and 284 of the record.

The Questions Involved.

The first three questions presented by the petition for writ of certiorari are no longer the subject of review by this Court.

The first three questions submitted in the petition deal with the interpretation of the Suits in Admiralty Act, 46, U. S. C. A., Sections 741, 742.

These questions have been finally disposed of by this Court in the case of *Brady* v. *Roosevelt Steamship Company, Inc.*, Number 269 of the October, 1942 Term, decided, January 18, 1943.

The Court below held in the case at bar that where a ship operator was a private corporation operating a vessel on its own behalf and not for the benefit of the United States Government, even though Government owned, that under such circumstances, the proper remedy was one under 46, U. S. C. A., Section 688 (The Jones Act), and not under Suits in Admiralty Act, 46, U. S. C. A., 741, 742.

But, since the decision by the Court below, this Court has gone further and has held that even where the vessel is operated on behalf of the Government by a private corporation, that Suits in Admiralty Act does

not apply, insofar as the tort of a private corporation is concerned.

Accordingly, an action by a seaman against his employer predicated upon the negligence of the private steamship company is properly brought under the Jones Act, irrespective of the fact that the Government is the owner of the vessel.

The fourth question presented is an inaccurate statement of the facts, as the record will show that the failure of light was only one factor of negligence, the one which prevented the seaman from seeing the dangerous condition created by the petitioner.

The question should have been stated as follows:

> Is evidence that shows that a shipowner failed to provide a seaman employed aboard his vessel with a reasonably safe place wherein to work, by reason of said shipowner creating a dangerous condition in a dark passageway without taking any steps to prevent an accident, sufficient to sustain a jury's verdict?

The fifth question raised is also inaccurately stated. The question should read:

> May reversible error be charged to a Trial Court for commenting in his charge on the medical evidence where no specific objection is taken to any part of the charge?

It is not error for a Trial Court to point out to the jury a conflict of evidence. If a party feels that a Trial Court has committed error in his charge to the jury, a specific objection must be taken to that portion of the charge deemed objectionable, failing which, error may not be charged to the Trial Court on the appeal.

The Facts.

The respondent was employed by the Moore-McCormack Lines, Inc., in the capacity of a marine engineer aboard the *S.S. Uruguay,* which was managed, controlled and operated by said Moore-McCormack Lines, Inc., and suffered injuries on the 26th day of June, 1939, while in the course of his employment aboard said vessel (R. pp. 3-4, 20, 21, 23, 236).

The accident was caused as a result of the petitioner failing to provide the respondent with a reasonably safe place wherein to work, in that a grate was removed and not replaced from the floor of the passageway in the starboard wing of the fireroom; and petitioner failed to provide any safeguards or give any warning to the respondent; and failed to provide any or adequate illumination, so that when Edward Foster started to walk through the passageway aforesaid, expecting a solid floor, he suddenly found himself falling through an opening several feet deep, where the grate had been removed and of which fact he had been kept in ignorance; nor could he see the dangerous condition, as the passageway was dark. The condition complained of had existed for several hours prior to the accident (R. pp. 25, 88, 89).

The petitioner denied liability and created a question of fact, which the jury resolved in the respondent's favor.

The Trial Court and the Circuit Court felt that there was ample evidence to sustain the jury's findings.

POINT I.

No principle is involved, or issue presented which this court should review or pass upon.

The Suits in Admiralty Act is applicable only in an action against the United States Government, or in a suit against a private corporation whose stock is entirely owned by the United States Government.

In the case at bar, the petitioner was a private corporation whose stock was not owned by the United States Government, and as a matter of fact, the vessel was not operated on behalf of the Government, but was operated on behalf of the business of a private corporation.

At no time prior to the judgment was the question of Government interest in the matter raised, and the record on appeal will show that there was no evidence that the United States was in any wise concerned in the action, or had any interest in the lawsuit, or would in any wise be called upon to pay the judgment or indemnify the petitioner in whole or in part.

The United States Government was not a party to the action and could not be made a party to the action as there was no liability against the United States Government.

The United States Government had no interest in the operation of the vessel, nor did it exercise any management, operation or control thereof, nor was it financially interested in any wise in the business of the defendant, or the outcome of the lawsuit.

However, since the petition was filed herein, the decision in the case of *Brady* v. *Roosevelt Steamship Company, Inc.* (*supra*), went further and held that a private corporation operating a Government owned vessel on behalf of the United States Government was still chargeable for its own personal torts.

There is no principle of law involved or question presented for this Court to pass upon as any doubt that might have existed has been clarified by the opinion in the case of *Brady* v. *Roosevelt Steamship Company, Inc.* (*supra*).

POINT II.

A disputed question of fact decided by a jury is not a subject for review by the United States Supreme Court.

The law is well settled as stated in the case of *Campana Corp.* v. *Harrison,* 114 F. (2d) 400, on page 405:

> "The reviewing Court does not review the evidence as an original fact finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility."

McDonald v. *Pless,* 238 U. S. 264;
Hyde v. *U. S.,* 225 U. S. 347;
Mattox v. *U. S.,* 146 U. S. 140;
8 Wigmore, Evidence (3rd Ed. 1940) 668-677, 282 ff.;
Sunderland, Verdicts General and Special 29 Yale L. J. 253 (1919).

The charge by the petitioner that the Trial Court committed reversible error in his charge, is unsupported by the facts as the record will show that no specific exception was taken to any part of the Court's charge.

It is the well settled law that an objection to a Court's charge must state distinctly the matter to which the objecion is made and the grounds therefor.

Krug v. *Mutual Benefit & Acc. Ass'n.*, 120 F. (2d) 296;
Lynch v. *Oregon Lumber Co.*, 108 F. (2) 283;
Cohen v. *Evening Star Newspaper Co.*, 113 F. (2) 523;
McVeigh, 117 F. (2) 672.

Also:

Title 28, U. S. C. A., Section 723 C, Rule 51.

The question of error as to a portion of the Court's charge cannot be raised on appeal where no specific exception to any part of said charge was taken at the trial. Questions of error not raised at the trial may not be the subject of review by an Appeal Court.

This is not a matter for review by the United States Supreme Court.

It is a simple action by a seaman who was injured aboard a vessel through his employer's negligence, where a jury has resolved the facts in the seaman's favor, which verdict the Trial Court refused to disturb and which judgment based thereon, the Circuit Court of Appeals for the Second Circuit affirmed unanimously.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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